FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY, *Petitioner*
v.
PAUL CUMMINS, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. PARKER SEAL MADE REASONABLE EFFORTS TO ACCOMMODATE CUMMINS UNDER THE STATUTORY SCHEME

Neither Cummins nor the *amici* seriously dispute that if this case had arisen under the basic anti-discrimination provision of Title VII, Parker Seal's proof before the Kentucky Commission and the federal trial court would have amply vindicated its position: The company may validly require a plant supervisor who heads up a department and functions as a part of management to be present on the job whenever his unit is scheduled for work. This simple, even-handed requirement surely would satisfy the test laid down

by the Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971): that the employment rule have "a manifest relationship to the employment in question."[1] As the United States concedes in its belated brief *amicus,* a person's refusal to work, even if attributable to his religious beliefs, may validly bear upon his employment opportunities "when it significantly affects his job qualifications" (U.S. Br. 15).[2] That concession is dictated by this Court's holding in *Griggs:* "Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, *religion,* nationality, and sex become irrelevant." *Griggs,* 401 U.S., at 436 (emphasis supplied).

Here Cummins' "religious practices"—his refusal to work Saturdays—indisputably "[were] sufficiently relevant to his job qualifications that they [might] properly be taken into account in connection with an employment practice"—a requirement of Saturday work (U.S. Br. 15-16). Not only did Cummins consistently refuse to perform the Saturday work his supervisory position entailed; he conceded that he would have refused Saturday labor even in an emergency, and even if the Saturday substitute whom Parker Seal furnished Cummins for over a year was unavailable (R. 102).

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[1] *Accord: Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975).

[2] Although the Government appears as *amicus* in support of Cummins, its status as employer has led it to resist claims of its public employees for exemption from Saturday work, even on behalf of agencies considerably larger (if not more profitable) than Parker Seal's Berea operation. *See Johnson* v. *United States Postal Service,* 497 F.2d 128 (5th Cir. 1974).

Even in the context of the expanded obligations imposed by the 1972 "religious accommodation" amendment to Title VII, neither Cummins nor the *amici* quarrel in principle with the factors which Parker Seal urges should be taken into account in assessing the reasonableness of its efforts to accommodate Cummins—efforts which demonstrate that Parker Seal acted properly under the statute (*see* Pet. Br. 44-55). Instead, Cummins now contends, Parker Seal should be held at fault because the company failed to coerce a solution—specifically, to force Cummins to take on different work hours, to assign him to a lower-ranking job, or to cut his pay (*see* Resp. Br. 28). These contentions are meritless.

—*Assignment to non-Saturday work.* It is suggested that Parker Seal could have alleviated the disparity in hours between Cummins and his fellow supervisors by assigning Cummins to more weekday work—an assignment which Cummins says he was willing to accept (Resp. Br. 28; COLPA Br. 25-26; U.S. Br. 20-22). There are three difficulties with this argument.

First, Parker Seal's plant manager at Berea made the judgment that Cummins could not simply be directed to take on new hours; he was a plant supervisor, "part of management" (R. 79). The plant manager reasonably concluded that he would not "giv[e] orders to supervisors"; rather, as part of his effort to forge a team with independent initiative, he expected his supervisors to work out scheduling matters on their own (R. 178, 185-86).[3] Thus, contrary to the

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[3] This view was corroborated by Cummins' membership in the Cost Goal program, a company-wide profit-sharing system which turned on each participant's initiative, incentive, and ingenuity (R. 80, 211-12).

Government's contention that "nothing in the record suggests" that an explicit directive to Cummins "was even considered by the company" (U.S. Br. 22), the record shows that such a managerial edict was considered, but ruled out.

Second, the Berea plant rarely operated on Sundays (R. 108, 135, 198-99). Thus, to impose longer weekday hours on Cummins would still have left him during the busy season with one less day of work per week than his fellow supervisors. The disparity in days worked would have prevailed throughout the period from Memorial Day to Labor Day (R. 198). The imposition of these added, uncompensated burdens on Cummins' fellow supervisors surely amounted to more than the mere "adjustment" in work schedules which the Government now suggests the EEOC may lawfully compel (*see* U.S. Br. 14-15).

Third, the argument for reassignment assumes that Cummins volunteered to relieve his fellow supervisors during the week. But Cummins testified that he made such offers in *1970,* when he first refused to work on Saturdays—not a year later in 1971, when his persistent unwillingness to carry his fair share of the load led to his discharge (R. 115-16). Even if his testimony is read expansively to cover the entire period, that testimony was contradicted by his plant manager and by each of the two knowledgeable fellow supervisors called to give evidence—one of them his own brother-in-law (R. 137). They testified that Cummins rarely volunteered to help them out—two or three times for Fain (R. 142), and three or four for Webb (R. 153, 155)—even after the plant manager had pointedly suggested such an arrangement as the solution to the

problem (R. 185, 202-03).[4] Significantly, Cummins never set up a proposed schedule for mid-week substitution or asked his superior to do so (R. 98-99).

In sum, Parker Seal's Berea plant manager made the reasonable proposal that Cummins should "go down and volunteer to take over a four (4) hour period for [his three fellow workers] in the evening" (R. 185). Contrary to Cummins' present complaint that Parker Seal's willingness to let him work out his scheduling problems with his fellow supervisors "forc[ed] him to justify his religion to the other employees who were disgruntled" (Resp. Br. 28), there was nothing "vague" or "anti-religious" about this suggestion: Cummins simply chose not to follow it.

The finders of fact below were well within their rights to credit the abundant evidence of Cummins' lack of cooperation. The Kentucky Commission on Human Rights heard the live testimony of the witnesses and observed their demeanor. It was cognizant of the evidentiary conflict on Cummins' willingness to volunteer, as was reflected in the probing questions which its members put to the witnesses (R. 98-99, 190-92). Moreover, the Commission was entitled to review the conflicting testimony in light of other circumstances —particularly, Cummins' concession that with no ostensible religious excuse, he had regularly refused to come in early with his shift during the week in violation of established company policy (R. 166-67, 169, 177).

Cummins had the opportunity to relitigate this (and every other) issue in a trial *de novo* before the federal

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[4] On one of these occasions, Cummins was "sort of a forced volunteer" when Fain was out sick (R. 183).

district court. He chose instead to rest on the record compiled in the state proceeding (R. 242). The trial court was entitled to draw an appropriate inference from Cummins' failure to adduce evidence, other than his own testimony, on the vital point of his willingness to cooperate.

—*Transfer to a different job.* Parker Seal's collective bargaining agreement with the union barred the company from shifting Cummins to a lower grade from his status as a supervisor in the Banbury department.[5] The company carefully considered transferring Cummins, but concluded it was not feasible (R. 72). For his part, Cummins never expressed interest in lower-scale employment (R. 99, 100). It taxes credulity to suggest that he would have acceded without complaint to a demotion in employment status from his position as "part of management" (R. 79).

—*Reduction in pay.* As a supervisor, Cummins received a set salary, without regard to hours worked (R. 188); by virtue of his seniority, he made more money than his fellow supervisors while working fewer hours (R. 188, 197). Yet he never suggested to his superior that he would be willing to suffer a reduction in pay in recompense for his shortened work week (R. 91, 101). Now, picking up on a suggestion of the court of appeals below, Cummins says Parker Seal should have forced him to take a pay cut (*see* 516 F.2d, at 550 (Pet. 29a)). Such a cut would not have alleviated the problem occasioned by Cummins' Saturday

[5] Contrary to the Government's present suggestion (U.S. Br. 24), the collective bargaining agreements, with which Cummins was familiar (R. 85-86, 101), were in evidence before both the Kentucky Commission (R. 85-86) and the federal district court (R. iii-iv).

absenses. Moreover, it would have amounted to at least 11% (figured on Cummins' failure to work an average of 5 hours per week out of 45 scheduled), and perhaps as much as 45% (figured on the difference between his average 40-hour week and the 72-hour week put in by his fellow supervisors). It is unlikely that Cummins would have left unchallenged any such unilateral cut in pay.

—*Unnecessary work.* Finally, Cummins suggests that his presence on Saturdays was unnecessary; that the Banbury operation largely ran itself, and that he spent most of his time scheduling work rather than actively supervising. That may have been his opinion. It was not shared by his superior, who testified that "Paul, in a responsible position, running a department, had to be there if that department was to function the way it should" (R. 180), or by the supervisor who replaced Cummins in the Banbury and who spent only one hour per shift away from the floor to make up the schedules (R. 168).[6] As with Cummins' failure to show up early for work with his men on mid-week shifts, the triers of fact were entitled to disbelieve Cummins' contention that his presence was unimportant.

Nor is there merit to Cummins' point that the second and (on occasion) third shifts of the Banbury

[6] It is suggested that Cummins' absence on Saturdays was so unimportant that the new plant manager was ignorant of it until long after his arrival on the scene (Resp. Br. 26; COLPA Br. 24). This mischaracterizes the record. Haddock learned of the problem within two months after he took over in mid-winter (R. 203). Saturday work occurred every week during the summer, but only infrequently during the winter. Thus it is likely that few, if any, Saturday workdays occurred for the Banbury during the first two months of Haddock's managership.

operated without separate supervision. Cummins conceded that the Banbury shift operated better with supervision than without (R. 81); in any event, the lesser number of men on the later shifts (two to six as against the nine or 10 on the first shift) did not justify economically the hiring of an extra supervisor (R. 95, 117-18, 189, 219-20).

* * *

In sum, the record establishes that Parker Seal's efforts to accommodate Cummins were substantial. Its determination to discharge him after more than a year of providing substitutes at no cost to Cummins did not arise from callous indifference or subtle bias on the part of management. Rather, it reflected the considered judgment of the plant manager, in conjunction with the general manager of the corporate division (R. 206-07, 235-36), that business necessity compelled action which the company had striven for over a year to avoid.

A fair reading of the evidence thus dispels any suggestion that the court of appeals below somehow read the "dry record" better than the trial court (COLPA Br. 28; *cf.* Seventh-Day Br. 9-10). The court of appeals was not empowered to review the record as a *de novo* trier of fact. Nor is its reading of the record more plausible than that of the Kentucky Commission, which had the benefit of live testimony, and the federal trial court, before which Cummins had the opportunity —but chose not—to supplement his losing case. Each of those fact-finding tribunals applied the same statutory standard to a disputed set of facts and arrived at the same conclusion: that Parker Seal made a reasonable attempt to accommodate Cummins. Their common judgment can hardly be deemed clearly erroneous. In reversing on the basis of its own *de novo* reassessment of the evidence, the court of appeals exceeded the permissible scope of appellate review. Its "finding"—which Parker Seal vigorously disputes—that "the major reason" for Cummins' discharge was the resentment of his fellow supervisors, is belied by the record read fairly and in its entirety. The judgment below should be reversed on this basis alone.

II. THE ESTABLISHMENT CLAUSE GOVERNS THE "RELIGIOUS ACCOMMODATION" SCHEME

Under the Establishment Clause decisions of this Court, a statute could not survive which compelled one person to make a cash contribution to the church of another's choice. Presumably such a statute would fall, no matter how small the contribution in amount or infrequent in occurrence. *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947).

There is no difference in principle between such a statute and the "religious accommodation" scheme of Title VII which is the subject of this lawsuit. The "religious accommodation" scheme compels the employer to yield to the religious dictates of the employee —unless the employer can affirmatively show that the resultant alteration in his business practices imposes not just a "hardship," but an "undue" hardship. As one of the *amici* here would have it, not even a showing of an actual cash outlay on the part of Parker Seal would have established such undue hardship; the employer should have proved a "demonstrated reduction in efficiency or output, . . . [or] an *extraordinarily* untoward impact on employee relations" (COLPA Br. 28 & n.3) (emphasis supplied).

The core constitutional issue in this case is whether any statutory regime which imposes such a burden on one private party at the behest of another's religious dictates can pass muster under the First Amendment.

Cummins and the *amici* advance a number of arguments in an effort to avoid First Amendment analysis. *First,* they say that in enacting the "religious accommodation" scheme in 1972, Congress merely exercised its broad power under the Commerce Clause to outlaw discrimination in employment on religious grounds (*see* Resp. Br. 13-14; Seventh-Day Br. 3-6; COLPA Br. 9-11; U.S. Br. 25 *et seq.*). However, Cummins has all but dealt himself out of this argument. Before the Kentucky Commission on Human Rights, his counsel disclaimed any contention that Parker Seal had "intended to discriminate against Mr. Cummins or anyone else of his religion by having [its] Saturday working policy" (R. 30).

In any event, Title VII, as originally enacted in 1964, has at all times barred religiously-motivated discrimination in employment. The 1972 "accommodation" amendment was not necessary to accomplish this objective, and no evidence to the contrary was presented to Congress (*see* Pet. Br. 20-28). The amendment does not toughen the congressional ban against discrimination in response to any evidence of shortcomings in then-existing law. The amendment is what it says it is—a congressional directive that the employer must affirmatively make obeisance to his employee's religious dictates.[7]

[7] A judicial determination that the 1972 "accommodation" amendment is unconstitutional will not disturb the basic statutory proscription against discrimination in employment on religious as well as other grounds set forth in Title VII as originally adopted in

Cummins and the *amici* implicitly concede that Congress in 1972 extended Title VII beyond its proscription of discrimination to outlaw something else—the employer's failure to alter business practices short of "undue hardship" in response to religiously-motivated demands. Constitutional authority for such an enactment, it is argued, may be found in the Commerce Clause (Seventh-Day Br. 4; U.S. Br. 25-27), the Necessary and Proper Clause (Synagogue Council Br. 21), the Free Exercise Clause of the First Amendment (Resp. Br. 13; Synagogue Council Br. 21; COLPA Br. 11), and the enabling clause of the Fourteenth Amendment (Seventh-Day Br. 4). The ultimate touchstone, the Government suggests, is one of "reasonableness" (U.S. Br. 29-31)—as though this case presented a Fifth Amendment challenge based on a generalized due-process complaint of substantive unfairness.

These arguments all miss the point. If the Establishment Clause could be put to one side, one or more of the foregoing provisions might well authorize the 1972 amendment. But the question here is not whether, apart from the Bill of Rights, Congress would have the power under the Constitution to enact the "religious accommodation" scheme. The issue is whether a specific provision of the Bill of Rights precludes the enforcement of such a statute. Unlike legislation designed to prohibit discrimination in employment based on race, sex, or age, a congressional statute which goes beyond a ban on religious discrimination to impose an affirmative

Section 703. There is thus no merit to the extravagant contention of one *amicus* that invalidation of this provision would implicitly deny any "justification for banning discrimination by race, or sex, or ethnic origins," and thereby call in question the constitutionality of all of Title VII (Seventh-Day Br. 4).

burden of "accommodation" runs headlong into the Establishment Clause.[8]

Finally, it is urged that the "religious accommodation" scheme merely carries over into the private sector the constraints which the Constitution imposes upon governmental activity. Surely, it is said, Congress may outlaw discrimination in private employment which the state and federal governments themselves are forbidden to undertake (Resp. Br. 22, 25; Seventh-Day Br. 3-6). The argument has a beguiling simplicity. It is true that under past decisions of this Court, the state and federal governments may refrain from imposing burdens on religiously-motivated people in the interest of preserving their free exercise of religion. *E.g., Wisconsin* v. *Yoder,* 406 U.S. 205 (1972) (Amish children exempt from mandatory public-school attendance); *Gillette* v. *United States,* 401 U.S. 437 (1971) (draft-law exemption for conscientious objectors is valid). Indeed, a failure to make such provision has sometimes—but not always—given rise to a First Amendment violation. *Compare Sherbert* v. *Verner,* 374 U.S. 398 (1963) (Free Exercise Clause compels granting of state unemployment benefits to one who refuses to work on Saturday due to his religious beliefs), *with Braunfeld* v. *Brown,* 366 U.S. 599 (1961)

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[8] Counsel for one of the *amici* recognized this difference when he wrote last year:

> "Even in the absence of any 'undue hardship,' the constitutionality of the [1972 'accommodation'] amendment is not entirely beyond question. It is one thing for Congress to say that an applicant may not be denied a job in private industry merely because he is a Jew (or Negro or Puerto Rican); it is another thing to say that the employer must inconvenience himself or his business or suffer a hardship less than 'undue' so that the Jew can observe his own religion." L. Pfeffer, *God, Caesar, and the Constitution* 335 (1975).

(Free Exercise Clause does not invalidate Sunday "blue" law as enforced against commercial business of Orthodox Jews).

But it hardly follows that because the Government is constrained by the Free Exercise Clause to avoid infringement on the religious rights of its citizens, it may therefore coerce a private person to yield to the religious dictates of another. The decisions upon which Cummins and the *amici* rely uniformly substantiate the difference.

—*Sherbert* v. *Verner, supra:* The Court concluded that "the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the *governmental* obligation of neutrality in the face of religious differences." 374 U.S., at 409 (emphasis supplied).

—*Wisconsin* v. *Yoder, supra:* The overriding necessity to avoid governmental coercion of religious persons was the key to "recognizing an exemption for the Amish from the *State's* system of *compulsory* education." 406 U.S., at 234-35, n.22 (emphasis supplied).

—*Zorach* v. *Clauson,* 343 U.S. 306 (1952): The Court sustained a "released time" program under which New York City public schools permitted students to leave the premises to attend religious centers for instruction or devotional practices. Both the majority and the dissenters agreed that state coercion to enforce the scheme on unwilling participants—the element indisputably present in this case—would necessarily vitiate the practice. *Id.,* at 311-12 (opinion per Douglas, J.); 318 (Black, J., dissenting); 321-23 (Frankfurter, J., dissenting); 323-25 (Jackson, J., dissenting). As Mr. Jus-

tice Black put it in words directly applicable to this case:

> "The state [here] . . . makes religious sects beneficiaries of its power. . . . Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids." *Id.*, at 318.

—*Welsh* v. *United States*, 398 U.S. 333 (1970): Four Justices broadly defined the provision granting a religious exemption from military service; one Justice, concurring, would have held the exemption invalid under the Establishment Clause. Mr. Justice White, dissenting (with whom the Chief Justice and Mr. Justice Stewart joined), rejected both approaches. Pertinently, he found no Establishment Clause violation in a statutory exemption drawn to avoid the *Government's* infringement on free exercise values that would have resulted from the absence of the exemption as enacted:

> "Congress may have granted the exemption because otherwise religious objectors would be *forced* into conduct that their religions forbid and because in the view of Congress to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect. . . .
>
> ". . . [W]ithout the exemption, *the law would compel* some members of the public to engage in combat operations contrary to their religious convictions. Indeed, one federal court has recently held that to draft a man for combat service contrary to his conscientious beliefs would violate the First Amendment." 398 U.S., at 369-70, 371-72 (emphasis supplied).

—*Marsh* v. *Alabama*, 326 U.S. 501 (1946): The "company town" case does not indiscriminately extend the foregoing principles of governmental accommodation to the private sector. As Mr. Justice Black, the author of the Court's opinion in *Marsh*, subsequently observed, "*Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town." *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 330 (1968) (dissenting opinion). That careful reading of *Marsh* has prevailed in recent decisions where this Court has declined to extend *Marsh* to property not thoroughly dedicated to a public use. *Hudgens* v. *NLRB*, 424 U.S. 507, 516-18 (1976); *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 562-63, 565 (1972). Together, *Hudgens* and *Lloyd Corp.* stand for the proposition which controls this case—simply because the Constitution requires the Government (or private activity functionally indistinguishable from government) to avoid infringements upon First Amendment liberty, it does not follow that government may compel private persons to follow suit to the point of hardship something less than "undue."

III. THE "RELIGIOUS ACCOMMODATION" SCHEME CANNOT PASS MUSTER UNDER THE COURT'S THREE-PART ESTABLISHMENT CLAUSE TEST

1. *The statute reflects an unduly sectarian purpose.* Cummins concedes: "It may well be that Senator Jennings Randolph when he sponsored the 1972 amendment felt that it would help his own religion" (Resp. Br. 15). Indeed, Senator Randolph made clear in his sponsoring remarks—which constitute virtually all the legislative history which accompanies the 1972 amend-

ment—that aid to his own and other religions observing the Sabbath on Saturday was the whole point and purpose of his proposed amendment (*see* Pet. Br. 21-22). In such circumstances, it is reasonable to conclude that Congress intended to achieve what the statutory sponsor said his legislation would accomplish.

Cummins argues that the amendment may survive the first branch of the tripartite test despite its sectarian legislative purpose on the theory that it reflects a permissible preference by Congress of those who hold religious beliefs over those who do not (Resp. Br. 15). This argument overlooks the Court's explicit holdings to the contrary: a law which favors *all* religion over non-religion is constitutionally suspect. *Torcaso* v. *Watkins,* 367 U.S. 488, 495 (1961); *Everson* v. *Bd. of Educ.,* 330 U.S., at 15. *See also Walz* v. *Tax Commission,* 397 U.S. 664, 670 (1970).

Moreover, the statutory purpose here plainly reflects an even more constitutionally suspect preference for *some* religions over others—specifically, a preference for those which observe a Saturday Sabbath. This point is made not only by Senator Randolph's sponsoring remarks, set forth at length in our main brief at 21-23 & n.12, but also by the fact that each of the religious organizations which have filed *amicus* briefs in this case observes its Sabbath on Saturday.

In sum, the 1972 amendment offends the policy, reaffirmed by the Court only last Term, that the State must observe "a scrupulous neutrality . . . as among religions, and also as between religious and other activities. . . ." *Roemer* v. *Bd. of Public Works,* —— U.S. ——, 96 S. Ct. 2337, 2344 (June 21, 1976) (No. 74-730).

Next, Cummins purports to discern a valid secular purpose for the 1972 amendment in a supposed congressional intent "to remove a barrier that *favored* a group of employees over others" (Resp. Br. 17) (emphasis supplied). This "favored" group, whose enjoyment of an unfair preference is somehow eliminated by the 1972 amendment, is nowhere identified. Nor can it be. The only groups "favored" here are those, such as Cummins' and others similarly situated, for whose religious benefit the 1972 amendment was adopted. The "accommodation" scheme empowers persons who claim a religious motivation, and none other, to demand exemption from work rules. It is these persons who are "favored" over their non-religiously motivated colleagues by the creation of a special statutory license to insist upon preferred treatment by their employers.

2. *The 1972 "accommodation" scheme exhibits a primary effect which benefits religion.* Cummins and the *amici* implicitly concede that the 1972 amendment confers a benefit upon religion, but urge that the benefit is merely "incidental" (Resp. Br. 14, 19; Seventh-Day Br. 7; COLPA Br. 21). We ask: Incidental to what? What primary function is accomplished by this statute, such that the undenied benefit to selected religious groups and activities is merely a collateral, passing, or unintended consequence? The answer is that a benefit to selected religious entities is *the* consequence. The 1972 statute triggers a heightened duty on the part of the employer solely on the basis of the *religious* demands of his employees. As is illustrated by the increasing volume of "accommodation" cases in the courts below, the largest number of such demands for

accommodation have come from those who observe their Sabbath on a Saturday.[9]

Cummins also argues that the statutory scheme adopts a pattern of equality, not of favoritism—it "does not aid 'all religion [as] against non-believers,'" he says, but "simply . . . insure[s] that each individual employee will be, to the greatest extent possible, treated identically with every other employee" (Resp. Br. 19, 20). This contention overlooks the plain language of the 1972 amendment. On its face the statute imposes a duty of "accommodation" upon the employer at the behest not of *all* employees, but only of religiously-motivated ones. A similar flaw undermines the somewhat narrower argument that equality of treatment may be found in the statute's application to "*all* aspects of religious observance and practice—not merely Sabbath observance" (COLPA Br. 21) (emphasis in original).

Finally, in an effort to draw upon a distinction suggested in recent school-aid cases, it is urged that the "accommodation" scheme can survive the "primary effect" test because it aids religious individuals, not groups (Resp. Br. 20). But that distinction cannot save the statute from condemnation if the "accommodation" scheme operates in practice to effectuate religious rather than secular ends. *See Roemer* v. *Mary-*

[9] According to one *amicus*, there is no evidence that the "religious accommodation" scheme benefits Saturday-observing religions (Seventh-Day Br. 7). That contention is refuted by Senator Randolph's announced objective—to counteract the "dwindling of the membership of *some* . . . religious organizations," *i.e.*, those espousing Saturday worship. 118 Cong. Rec. 705; Pet. Br. 22 (emphasis supplied). The contention is further belied by the record in this case, which shows that Cummins' pastor regarded his parishioner's Saturday church attendance as "important to the congregation" and "serv[ing]" to strengthen [his] church" (R. 45).

land Bd. of Public Works, supra, at ——, 96 S. Ct., at 2349; *Meek* v. *Pittenger,* 421 U.S. 349, 366 (1975); *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973). Moreover, the contention is belied by the same evidence which points to the forbidden primary effect of this legislation: its benefits extend not only to individual religionists, but to groups as well—in the words of the court of appeals below, to the "*churches* holding services on Saturdays [which] may enjoy a somewhat larger attendance with a correspondingly fuller collection plate." 516 F.2d, at 553 (Pet. 36a) (emphasis supplied).[10]

3. *The statutory scheme risks forbidden entanglement.* Cummins asserts that the "religious accommodation" scheme passes muster under the third branch of the tripartite test because the Government is not subject to "active involvement" in religious activity (Resp. Br. 19). But the school-aid cases demonstrate

[10] The Court is urged to distinguish its school-aid decisions on the ground that this is not a case of "massive subsidy" (COLPA Br. 20). The same point was pressed by the court below when it stressed the absence of direct "financial support . . . for religious institutions," 516 F.2d, at 553 (Pet. 36a). But as we previously noted (Pet. Br. 28, n.17), this Court's past decisions forbid "subtle departures from neutrality, . . . as well as obvious abuses," *Gillette* v. *United States,* 401 U.S. 437, 452 (1971); *See Walz* v. *Tax Commission,* 397 U.S., at 696 (opinion of Harlan, J.). They proscribe nonfinancial governmental sponsorship as well as direct subsidies. *Committee for Public Educ.* v. *Nyquist,* 413 U.S. 756, 772 (1973).

To like effect is the argument of one *amicus* that the school-aid cases differ because "those decisions forbid the state to pay for educational services which it may itself not constitutionally furnish," whereas here the employer is not statutorily compelled to pay for services which the employee feels he may not furnish, because of his religious convictions (Synagogue Council Br. 14-15). This argument founders on its reading of the "accommodation" statute: a unilateral cut in pay for a salaried employee presumably offends the statutory policy as much as an outright discharge.

that the absence of direct state participation in religious institutions does not end the matter; on-going state inquiry to confirm the non-sectarian nature of the funded activity can lead to the forbidden result. *See Meek* v. *Pittenger,* 421 U.S., at 369-72 (plurality opinion); *Lemon* v. *Kurtzman,* 403 U.S. 602, 618-19 (1971). Here the "surveillance of . . . religious institutions by the state," which one *amicus* asserts is entirely absent (Seventh-Day Br. 8) and another soothingly assures will be "quick and nonjudgmental" (U.S. Br. 49), in fact pervades the statutory scheme: Such surveillance is necessarily presented on each occasion that the EEOC or a federal court is called upon to assess the religious nature of the activity for which an employment preference is demanded by the complaining employee. It merits emphasis that the statutory amendment shelters not only religious belief, but "all aspects of religious observance and practice" as well. 42 U.S.C. § 2000e(j). Presumably this encompasses more than attendance at church services. Unless the administrative agency and the judiciary are simply to take the word of the church at face value,[11] the Government will be thrust into the determination whether "observance and practice" include such church-related functions as vestry meetings, church fund-raisers, or (as is reflected in the record of this case), youth activities in which Cummins engaged (R. 42).

Likewise, the searching inquiry into the *bona fides* of the employee's professed religious belief which is mandated under the "accommodation" scheme cannot be lightly dismissed. As we have explained above, such

[11] *Cf. Serbian Eastern Orthodox Diocese* v. *Milivojevich,* —— U.S. ——, ——, 96 S. Ct. 2372, 2380-83 (June 21, 1976) (No. 75-292).

inquiry in other contexts (notably the draft-law cases) has been justified only because of the constraints which are placed upon governmental action by the free exercise clause (see *supra,* at 13-14).

CONCLUSION

For the foregoing reasons, Parker Seal Company, the petitioner, respectfully submits that this Court should reverse the judgment of the court of appeals below, and should remand the cause with instructions to reinstate the judgment of the district court dismissing Cummins' complaint.

Respectfully submitted,

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